

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2305

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**JAMES A. KIRNER, DONALD KIRNER AND
RICHARD L. KIRNER, AS TENANTS IN COMMON,
AND D/B/A TRIPLE K FARMS,**

PLAINTIFFS-APPELLANTS,

V.

ROLAND AND SHEILA FROESE, AND ROGER DIEHL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Bartell,¹ JJ.

¹ Circuit Judge Angela B. Bartell is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. James, Donald and Richard Kirner appeal a judgment and an order in favor of Roland and Sheila Froese and Roger Diehl. The issues are: (1) whether the trial court properly concluded that the Froeses were entitled to a prescriptive easement over the Kirners' land; (2) whether the trial court erred in granting the prescriptive easement over the full width of the improved road; and (3) whether § 706.09(1), STATS., barred the Froeses' claim. We resolve these issues against the Kirners. Accordingly, we affirm.

The Froeses purchased land that was not accessible by public road, although they thought there was an easement over an adjoining farm owned by the Kirners. The easement was not recorded but, according to testimony at trial, the predecessor-in-title to the Froeses had been using a roadway across the Kirners' land since at least the 1950s. After the Kirners informed the Froeses that they were not allowed to use the road, the Froeses brought this action. The trial court awarded the Froeses a prescriptive easement across the land.

The Kirners contend that the Froeses did not establish a claim for adverse possession. First, they argue that there is no evidence that the Froeses' predecessor-in-title, Calvin Schneller, had the requisite hostile intent because he used the road believing that he had permission to do so. A prescriptive easement is created by adverse possession when a person uses land in a manner that is "hostile," the use is visible and open, the use is made under an open claim of right, and the use is continuous and uninterrupted for a period of at least twenty years. *Widell v. Tollefson*, 158 Wis.2d 674, 684, 462 N.W.2d 910, 913 (Ct. App. 1990). "Hostile use" does not mean that the user's intent is unfriendly or that there has been some manifestation of ill will. *Id.* at 685, 462 N.W.2d at 913. Rather, "hostility merely requires that the use be inconsistent with the title owner's rights." *Id.*

We conclude that the trial court properly ruled that the use was hostile. We agree with the Froeses that Schneller did not use the land in the belief that he had permission to do so. The record indicates Schneller believed there was an easement allowing him to use the road. Stated differently, he thought he had a *right* to use the road. Because his use of the road was under an open claim of right, it was inconsistent with the title owner's rights.

The Kirners also argue that the use of the road was not "continuous" because the road was used only twenty or fewer times per year. "Continuity of use depends on the nature and character of the right claimed." *Id.* at 685, 462 N.W.2d at 914. The trial court made a factual finding that the land was "used ... continuously and [at] varying times consistent with what the usage was for this land, whether it was for farming usage or recreational usage." The trial court properly found that the use was continuous because it is not the number of times the road was traveled that determines whether the road was used continuously, but how frequently the road was used in light of the land usage.

The Kirners next argue that the trial court erred in awarding the Froeses a prescriptive easement over the full current width of the road, about sixteen feet, rather than over the ten- to twelve-foot width of the road before it was improved and as it existed over much of the twenty-year period during which the adverse possession claim was established.

"The law is well settled that the scope of a prescriptive easement is determined by the scope of the use giving rise to the easement." *Id.* at 686, 462 N.W.2d at 914. "[B]ecause no use can ever be exactly duplicated, the use giving rise to a prescriptive easement determines only the general outlines of the easement, rather than the minute details of the interest." *Id.* A prescriptive

easement awarded by virtue of adverse possession should reasonably comport with the prior use made of the land subjected to the easement. *Id.* at 686-87, 462 N.W.2d at 914.

The trial court found that the Froeses and their predecessors-in-title had used the road for agricultural, recreational and personal uses. The trial court's judgment permits the Froeses and their successors to continue to use the road for the same purposes. As a practical matter, it would be nearly impossible to use only the width of the road as it previously existed when driving along it. We conclude that the trial court properly exercised its discretion in awarding the Froeses a prescriptive easement over the full current width of the road.

Finally, the Kirners argue that § 706.09(1), STATS., barred the Froeses' prescriptive easement claim. That statute bars certain claims adverse to a person who purchases property where the claim is made "without notice" The trial court found that the Kirners were not entitled to the benefit of § 706.09(1) because they had actual notice of the adverse use of the field road. The trial court's finding is supported by James Kirner's testimony at trial. Therefore, § 706.09(1) does not bar the Froeses' claim for a prescriptive easement. *See Schapiro v. Security Sav. & Loan Ass'n*, 149 Wis.2d 176, 186, 441 N.W.2d 241, 246 (Ct. App. 1989) ("[t]o be entitled to the benefits of this section, a purchaser must not have notice of the prior adverse claim").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

